NO. 48773-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TROY ALLEN FISHER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01616-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. Judge Johnson did not abuse her discretion in denying the motion to recuse.

STATEMENT OF THE CASE

Troy Fisher's initial sentence was reversed by this Court. The matter came on for resentencing before the Honorable Barbara Johnson (Ret.) on March 23, 2016. Prior to the sentencing hearing, Fisher filed two motions seeking Judge Johnson's recusal from his case. They are found at CP 72-73 and 77-78. Judge Johnson denied the motions. RP 75-80. Fisher was resentenced within the standard range. CP 88. This timely appeal followed.

ARGUMENT

I. Judge Johnson did not abuse her discretion in denying the motion to recuse.

Fisher claims that he should be granted a new sentencing hearing because Judge Johnson erred in denying his motion that she recuse herself from his sentencing hearing. Fisher's appeal should be rejected.

In the beginning of his argument, Fisher spends several pages rehashing portions of the argument he made at the resentencing hearing about Judge Johnson possibly not falling within the parameters of RCW

2.08.180 in her decision to preside over the resentencing hearing. But he never actually argues that Judge Johnson erred in the finding she made under that statute. In fact, he argues that Judge Johnson correctly applied *State v. Belgarde*, 119 Wn.2d 711, 718, 837 P.2d 599 (1992) and RCW 2.08.180. It is unclear why Fisher even brings this portion of the motion up in his brief considering that he concedes Judge Johnson acted properly in this regard.

Fisher next argues that Judge Johnson misunderstood his motion for recusal as one alleging actual bias as opposed to an appearance of bias. He focuses on Judge Johnson's nomenclature at the hearing where she says "[a]s far as the allegation of actual prejudice," and later says "I find no basis for disqualification or prejudice." RP 75-76. Fisher quibbles with Judge Johnson's use of the term "prejudice," claiming it proves an abuse of discretion by applying the wrong legal standard to his motion to recuse. This is so, he claims, because recusal is proper not just when there is actual bias, but where there may be a mere appearance of unfairness. But Fisher doesn't show that Judge Johnson misunderstood or misapplied the law, and he completely ignores the fact that in his motions for recusal, he claimed that Judge Johnson was *actually prejudiced* against him. CP 72-73, 77-78. Fisher is essentially complaining that Judge Johnson responded to the precise claim he made. Fisher's claim that Judge Johnson

misapplied the law is meritless. Judge Johnson painstakingly reviewed the allegations made against her by Fisher and explained why they did not warrant her recusal from the case. RP 75-80. The reasons she cited applied not only to a claim of actual bias, but to an appearance of bias. Fisher's claim that Judge Johnson abused her discretion by incorrectly applying the law fails.

Judge Johnson did not abuse her discretion in denying the motion to recuse on the merits of the motion. The standard for reviewing such a claim is well settled:

> The Washington Supreme Court has characterized a judge's failure to recuse himself or herself when required to do so by the judicial canons as a violation of the appearance of fairness doctrine, and has narrowed the scope of the appearance of fairness doctrine in the context of judicial decision making to whether there is evidence of a judge's or decision maker's actual or potential bias. *Tatham v. Rogers*, 170 Wn.App. 76, 94, 283 P.3d 583 (2012) (citing *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992)). Before the appearance of fairness doctrine will be applied, there must be evidence of a judge's actual or potential bias. *State v. Dominguez*, 81 Wn.App. 325, 329, 914 P.2d 141 (1996). If a party presents sufficient evidence of bias, "[t]he test is whether a reasonably prudent and disinterested observer would conclude [the party] obtained a fair, impartial, and neutral trial." *Id.* at 330, 914 P.2d 141.

State v. C.B., 195 Wn.App. 528, 545, 380 P.3d 626, 635 (2016).

As to Fisher's claim that Judge Johnson failed to rule on several CrR 7.8 motions, the only support for that claim in the record comes from Fisher himself in his declaration in support of the motion to recuse—

which is to say there is nothing substantive in the record to support this claim. CP 73. Fisher could have attached some kind of proof of this fact to his declaration, but he didn't. As to Fisher's vague claim in his motion that Judge Johnson failed to rule on his suppression motions before his case came on for trial, he failed to cite to the record for that claim. CP 73. As to Fisher's claim that his filing of a complaint with the Commission on Judicial Conduct against Judge Johnson compelled her recusal (made both in his motion to recuse (CP 77-78) and in his Brief of Appellant), Fisher cited no authority below or in his brief to this Court which holds that a judge must recuse herself from a proceeding, under the appearance of fairness doctrine, when a litigant files a CJC complaint. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). The reason for not compelling a judge to recuse herself in the face of a CJC complaint is obvious: it would allow litigants to judge-shop by filing such complaints. Whether a judge's impartiality could reasonably be questioned is a question to be left to the discretion of the trial court.

As to Fisher's remaining arguments in support of his claim that Judge Johnson abused her discretion in not recusing herself, they can be

summed up as follows: Judge Johnson, in her capacity as trier of fact, convicted Troy Fisher. Then she sentenced him. Therefore, she must be prejudiced against him. But the reason Judge Johnson acted as the trier of fact is because Troy Fisher asked her to—by waiving his right to a jury trial. He set up his current claim of "error." He knew full well that when he asked Judge Johnson to act as the trier of fact in his case, she would be the one responsible for sentencing him in the event of a conviction. "The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Mercado*, 181 Wn.App. 624, 630, 326 P.3d 154, 157 (2014), citing *State v. Wakefied*,130 Wn.2d 464, 475, 925 P.2d 183 (1996); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). Further, Fisher cites no authority for his claim that when a judge imposes a sentence that is reversed by the appellate court, the resentencing should occur before a different judge because a judge who initially imposed the improper or illegal sentence must necessarily be biased against him.

Judge Johnson did not abuse her discretion in denying Fisher's motion for recusal and his sentence should be affirmed.

CONCLUSION

Fisher's sentence should be affirmed.

DATED this 4th day of January 2017.

Respectfully submitted:

ANTHONY F. GOLIK
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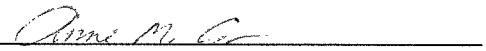
Clark County, Washington

By: 

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